IN THE MISSOURI SUPREME COURT

No. SC85902

IN THE MATTER OF THE ESTATE OF JOHN J. BOLAND, SR.

CLAIM OF MARY FRANCES (BOLAND) HALLIDAY.

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

This appeal stems from a Judgment entered by the Probate Division of the Circuit Court of St. Louis County denying the Claim of Mary Francis Boland a/k/a Pat Halliday (hereinafter referred to as "Halliday").

James J. Boland, Sr. (hereinafter referred to as "Boland"), deceased, and Halliday were married on or about April 22, 1975. On or about July 9, 1981 the St. Louis County Circuit Court, Division 9, entered a Decree of Dissolution dissolving the marriage of Boland and Halliday. A Separation Agreement executed by the parties was incorporated into the Decree of Dissolution and made a part thereof. (L.F. 20) The Separation Agreement provided, *inter alia*., that:

> Said maintenance payments shall continue until the first to occur of:
>
> A. Wife's remarriage;
>
> B. The death of either party;
>
> C. The amount and/or period of time is modified by the Court. . .
>
> Additionally, Husband shall keep in full force and effect life insurance covering his life in the principal sum of not less than $50,000, upon which Wife is irrevocably designated as the beneficiary during her lifetime. Such life insurance shall not be payable to Wife in the event of her remarriage, prior to Husband's death. Husband shall exhibit to Wife, upon her

> reasonable request, at reasonable intervals, evidence that she continues to be designated irrevocably as the beneficiary on such policy of insurance.

(L.F. 24)

Further, the Separation Agreement provided that,

> "[i]n the event that any provision of this Agreement is unenforceable *when* incorporated as part of the Court's judgment, it shall be considered severable and enforceable by an action based on contractual obligation and it shall not invalidate the remainder of this Agreement as incorporated in any Decree. (emphasis added)

(L.F. 24, 25)

On or about February 15, 2003 Boland died and it was discovered that he did not maintain life insurance payable to Halliday. Thereafter, on or about March 12, 2003, Edward C. Vancil, attorney for the Boland estate, advised Halliday's counsel, Leonard J. Frankel, that the obligation to maintain the life insurance policy as set forth in the Separation Agreement was conclusively presumed paid because Halliday had failed to revive the Judgment. (L.F. 52 – 54) Halliday filed a Claim against Boland's Estate alleging that Boland failed to keep in full force and effect the life insurance policy set forth in the Separation Agreement and that further, Boland's breach of the Separation Agreement violated the Judgment of the Court.

On March 2, 2004, Halliday filed her Memorandum of Law in support of her Claim. Halliday discussed at length the applicability of §516.350. Halliday argued that §516.350 did not bar the enforcement of the provision of the Separation Agreement relating to the life insurance policy without raising the issue of the Constitutionality of the statute. (L.F. 40 – 43) On March 8, 2004, the St. Louis County Circuit Court, Probate Division, entered its Order and Judgment denying the Claim of Halliday.

POINTS RELIED ON

I. This Court does not have Jurisdiction to hear this appeal because Halliday failed to raise the issue of the Constitutionality of §516.350 RSMo. at her earliest opportunity.

Mo. Const. art. 5, §3;

§516.350 RSMo.

Creamer v. Banholzer, 694 S.W.2d 497, 499 (Mo.App. 1985);

Severson v. Dickinson, 248 S.W. 595, 596 (Mo 1923); and

Morrow v. Caloric Appliance Corp., 362 S.W.2d 282, 285 (Mo. App. S.D. 1962).

II. Section 516.350(3) RSMo does not violate the contacts clause and the vested-rights clause of article 1, section 13 of the Missouri Constitution because §516.350(3) RSMo does not take away any vested right but rather clarifies additional classes of Judgments that are not presumed paid pursuant to §516.350(1) RSMo. (Response to Appellant's Point I.)

Mo. Const. art. 1, §13;

§516.350(1) RSMo (1982);

§516.350(1) RSMo (2002); and

§516.350(3) RSMo (2002)

III. The Probate Division of the St. Louis County Circuit Court correctly denied Halliday's claim because the provisions of the Separation Agreement relating to life insurance did not mandate the making of periodic payments and

therefore the Judgment was conclusively presumed paid pursuant to §516.350(1) RSMo. (Response to Appellant's Point II.)

§516.350(1) (1982);

§516.350(1) (2002);

M.A.Z. v. F.J.Z., 943 S.W.2d 781, 791 (E.D. Mo. 1997); and

Hanff v. Hanff, 987 S.W.2d 352 (E.D. Mo. 1999)

IV The Probate Division of the St. Louis County Court correctly denied Halliday's claim in that the Judgment was conclusively presumed paid pursuant to §516.350(1) RSMo and said decision was not based upon §516.350(3) RSMo. (Response to Appellant's Point III.)

§516.350(1) (2002);

§516.350(3) (2002); and

Hanff v. Hanff, 987 S.W.2d 352 (E.D. Mo. 1999)

V. The Probate Division of the St. Louis County Circuit Court correctly denied Halliday's claim because Halliday failed to revive the Judgment as required by §516.350 RSMo. (Response to Appellant's Point IV.)

§516.100 RSMo.;

Daily v. Daily, 912 S.W.2d 110, 114 (Mo.App. 1995);

Hughes v. Hughes, 23 S.W.3d 838, 839 (Mo.App. 2000);

Helfenbein v. Helfenbein, 871 S.W.2d 131, 134 (Mo. App. 1994);

Hanff v. Hanff, 987 S.W.2d 352, 356 (Mo.App. 1999);

Principal Mutual Life Ins. Co. v. Karney, 5 F.Supp. 720 (E.D.Mo. 1998);

Hedges v. McKittrick, 153 S.W.2d 790 (Mo.App. 1941);

Wormington v. City of Monett, 218 S.W.2d 586 (Mo. banc. 1949); and

Ronollo v. Ronollo, 936 S.W.2d 188 (Mo.App. 1996)

ARGUMENT

I. This Court does not have Jurisdiction to hear this appeal because Halliday failed to raise the issue of the Constitutionality of §516.350 RSMo. at her earliest opportunity.

The Missouri Constitution, Article 5, section 3, provides that the Supreme Court shall have exclusive jurisdiction over constitutional questions. "A constitutional question must be raised at the earliest possible time consistent with good pleading and orderly procedure under the circumstances of a given case. Otherwise, it will be waived." *Creamer v. Banholzer*, 694 S.W.2d 497, 499 (Mo. App. E.D. 1985); *Severson v. Dickinson*, 248 S.W. 595, 596 (Mo 1923). Further, there are four requirements to preserve a constitutional question for appellate review: (1) the question must be raised at the first opportunity; (2) the constitutional provision in question must be specified; (3) the constitutional question must be preserved in a motion for new trial; and (4) it must be adequately covered in the appellate briefs. *Morrow v. Caloric Appliance Corp.*, 362 S.W.2d 282, 285 (Mo. App. S.D. 1962).

Halliday has failed to preserve the constitutional question set forth in her Point I. On or about March 12, 2003, Edward C. Vancil, attorney for the Boland estate, advised Halliday's counsel, Leonard J. Frankel, that the obligation to maintain the life insurance policy as set forth in the Separation Agreement was conclusively presumed paid because

Halliday had failed to revive the Judgment. Despite being advised by counsel for the Boland estate that the Judgment was conclusively presumed paid pursuant to §516.350, Halliday failed to raise any objection based upon an alleged violation of her constitutional rights in her pleadings, at trial or in her Memorandum of Law at Hearing. Halliday first raised the constitutional question in her Notice of Appeal to the Supreme Court. Halliday has wholly failed to preserve her claimed constitutional question for appellant review.

Because Halliday failed to raise the constitutional question until her Notice of Appeal, she has failed to properly invoke the jurisdiction of this Court. Therefore, Halliday's appeal should and must be dismissed.

II. Section 516.350(3) RSMo does not violate the contacts clause and the vested-rights clause of article 1, section 13 of the Missouri Constitution because §516.350(3) RSMo does not take away any vested right but rather clarifies additional classes of Judgments that are not presumed paid pursuant to §516.350(1) RSMo. (Response to Appellant's Point I.)

Halliday alleges that §516.350 (2002) extinguishes rights that she had prior to the amendment, and, therefore, violates Article 1, section 13 of the Missouri Constitution. Halliday's argument is without basis. Halliday's judgment against Boland relating to life insurance was conclusively presumed paid on July 10, 1991. As such, Halliday's ability to enforce that portion of the Decree of Dissolution relating to insurance expired over ten years before the enactment of §516.350(3).

In filing her claim against the estate of Boland, Halliday attempts to enforce a certain provision of the Decree of Dissolution entered on or about July 7, 1981. Even if Halliday's ability to enforce the Divorce Decree had not expired prior to the enactment of the current version of §516.350 it did not extinguish any rights of Halliday, in possible violation of Article 1, section 13 of the Missouri Constitution. To fully analyze the impact of §516.350 (2002) on Halliday's claim against the estate of Boland we must look to prior versions of §516.350.

Section 516.350(1) (1982) provided:

> Every judgment, order or decree of any court of record of the United States, or of this or any other state, territory or country, except for any judgment, order, or decree awarding child support or maintenance which mandates the making of payments over a period of time, shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof, of if the same has been revived upon personal service duly had upon the defendant or defendants therein, then after ten years from and after such revival, or in case a payment has been made on such judgment, order or decree, and duly entered upon the record thereof, after the expiration of ten years from the last payment so made, and after the expiration of ten years from the date of the original rendition or revival upon personal service, such

judgment shall be conclusively presumed to be paid, and no execution, order or process shall issue thereon, nor shall any suit be brought, had or maintained thereon for any purpose whatever.

Section 516.350(1) (2002) now provides:

Every judgment, order or decree of any court of record of the United States, or of this or any other state, territory or country, except for any judgment, order, or decree awarding child support or maintenance *or dividing pension, retirement, life insurance, or other employee benefits in connection with a dissolution of marriage, legal separation or annulment* which mandates the making of payments over a period of time *or payments in the future*, shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof, or if the same has been revived upon personal service duly had upon the defendant or defendants therein, then after ten years from and after such revival, or in case a payment has been made on such judgment, order or decree, and duly entered upon the record thereof, after the expiration of ten years from the last payment so made, and after the expiration of then years from the date of the original rendition or revival upon personal service, or

> from the date of the last payment, such judgment shall be conclusively presumed to be paid, and no execution, order or process shall issue thereon, nor shall any suit be brought, had or maintained thereon for any purpose whatever. *An action to emancipate a child, and any personal service or order rendered thereon, shall not act to revive the support order*. **(emphasis added to reflect changes in Statute).**

Clearly, the plain language of §516.350(1) (2002) does not extinguish any right of Halliday but rather merely adds an additional class of judgments that are not conclusively deemed paid under §516.350(1) (2002). Our analysis then must turn to 516.350(3) (2002), which provides:

> In any judgment, order or decree dividing pension, retirement, life insurance, or other employee benefits in connection with a dissolution of marriage, legal separation or annulment, each periodic payment shall be presumed to paid and satisfied after the expiration of ten years from the date that periodic payment is due, unless the judgment has been otherwise revived as set out in subsection 1 of this section. This subsection shall take effect as to all such judgments, orders, or decrees which have not been presumed paid pursuant to subsection 1 of this section as of August 28, 2001.

Again, subsection three of 516.350 (2002) does not extinguish any rights that Halliday enjoyed prior to its enactment. Subsection three clearly provides that if the judgment was not deemed paid pursuant to subsection 1 as of August 28, 2001, then it would provide additional protection for the type of judgments set forth in subsection three. Nothing contained in either 516.350(1) or 516.350(3) (2002) takes away any rights of Halliday. Halliday's ability to enforce the Divorce Decree as it relates to life insurance expired over ten years before the current version of §516.350 was enacted. Further, rather than taking away rights, §516.350 (2002) provides additional protection for a limited class of judgments.

Because §516.350(3) (2002) does not impair any existing right Halliday had in the enforcement of the 1981 Decree of Dissolution, said section does not violate article 1, section 13 of the Missouri Constitution.

III. The Probate Division of the St. Louis County Circuit Court correctly denied Halliday's claim because the provisions of the Separation Agreement relating to life insurance did not mandate the making of periodic payments and therefore the Judgment was conclusively presumed paid pursuant to §516.350(1) RSMo (1982). (Response to Appellant's Point II.)

Halliday, in arguing that Boland's obligation to keep in full force and effect life insurance was an order for periodic maintenance, attempts to impose obligations on Boland that simply do not exist under the terms of the Separation Agreement. Halliday's bald assertion that the Separation Agreement (as it relates to insurance) mandates that Boland make payments over a period of time so as to except it from the provisions of

§516.350(1) flies in the face of the plain language of the Separation Agreement. In fact, Halliday acknowledges in Point III of her Brief that there are no periodic payments due under the agreement and that the no payment is due until after Boland died. Appellant's Brief, at 22, 23.

The Separation Agreement merely ordered Boland to "keep in full force and effect life insurance covering his life in the principal sum of not less than $50,000." (L.F. 24) The Decree of Dissolution did not specify the manner Boland had to employ to keep in full force and affect the life insurance. Specifically, Boland was not ordered to pay monthly, semi-annual or annual payments on the life insurance. Clearly, the method used by Boland to keep in force the life insurance policy was left up to him. The options for complying with this provision of the Separation Agreement were numerous. Boland was free to merely convert an existing, paid in full policy, to name Halliday as beneficiary; or Boland could simply purchase an annuity policy which would be paid in full at the time of purchase. There was absolutely no agreement between the parties that Boland would make periodic payments on the life insurance policy or that Boland would make a payment at some point in the future. In fact, the life insurance provisions do not require Boland to pay any sums. Any money to be paid to Halliday would come from an insurance company. See *M.A.Z. v. F.J.Z.*, 943 S.W.2d 781, 791 (E.D. Mo. 1997)

Missouri courts have decided the applicability of §516.350(1) (1982) as it relates to life insurance. In *Hanff v. Hanff*, 987 S.W.2d 352 (E.D. Mo. 1999) the parties entered into a Settlement Agreement in which Husband agreed to retain Wife as beneficiary on all life insurance policies. Husband removed Wife as the beneficiary on one life

insurance policy and surrendered another policy. Thereafter, Husband continued to represent to Wife that she remained the beneficiary. The Court of Appeals, in overturning the trial court's finding that §516.350 (1982) did not bar enforcement of the judgment, found that the "limitation period begins to run when the judgment is rendered, not when the debt becomes certain, due, or enforceable." *Id.* at 356. Further, the Court, in facts strikingly similar to the case at bar, found that "[a]bsent timely revival, section 516.350 plainly forbids the enforcement of judgments over ten years old by conclusively presuming the judgments have been paid. The language of section 516.350 naturally lends itself to a bright-line approach: either revive a judgment within ten years of its entry or relinquish all rights of enforcement." *Id.* at 356.

The Judgment that is the subject matter of this Appeal was entered on July 9, 1981. Halliday took absolutely no action to revive the Judgment and as such, the Judgment was presumed paid on July 10, 1991. By failing to revive the Judgment within ten years, Halliday has relinquished her right to collect the Judgment. Because Boland's obligation to "keep in full force and effect" life insurance naming Halliday beneficiary does not call for periodic payments, the Probate Court correctly found that §516.350 barred Halliday's claim against Boland's estate.

IV The Probate Division of the St. Louis County Court correctly denied Halliday's claim in that the Judgment was conclusively presumed paid pursuant to §516.350(1) RSMo and said decision was not based upon §516.350(3) RSMo. (Response to Appellant's Point III.)

In Point III, Halliday argues that the Judgment of the Probate Court denying her claim against the estate of Boland must be overturned because §516.350(3) (2002) does not apply. The Probate Court does not specify in its Judgment that it relied on §516.350(3) (2002) in denying Halliday's claim. As discussed above, the Probate Court could have correctly denied Halliday's claim pursuant to §516.350(1) as previously applied in *Hanff*. Accordingly, Halliday's argument that the Probate Court must be overturned because it relied on §516.350(3) is misplaced.

Assuming *arguendo* that it is found that Boland's obligation to keep life insurance in effect for the benefit of Halliday does constitute "periodic maintenance" then §516.350(3) applies. Implicitly, Halliday argues that life insurance is not an exception to the general rule requiring revival under subsection 1, because it is periodic maintenance, yet at the same time argues that subsection 3 does not apply because life insurance does not require periodic payments and is not related to an employee benefit. To interpret §516.350 (2002) as suggested by Halliday would be unjust and render logically inconsistent results. Following this argument to its logical conclusion would result in Judgments involving life insurance relating to an employee benefit being barred after ten years from the date of each periodic payment, yet life insurance not related to an employee benefit would never have to be revived. The Legislature, in enacting §516.350(3) (2002) could not have intended to create such a result. There is no logical reason to except one type of life insurance and not another. Clearly, if Halliday's claim against Boland's estate is not barred pursuant to §516.350(1) then it falls within

§516.350(3) which provides that the life insurance exception only applies to judgments not presumed paid as of August 28, 2002.

As discussed above, the provision of the Divorce Decree relating to life insurance was conclusively deemed paid as of July 10, 1991. Nothing in §516.350 (2002) provides for reinstating Judgments previously deemed paid. To hold that Judgments previously deemed paid are now subject to enforcement would defeat the purpose of §516.350 and open a potentially unending race to the court house to revive decades old judgments.

V. The Probate Division of the St. Louis County Circuit Court correctly denied Halliday's claim because Halliday failed to revive the Judgment as required by §516.350 RSMo. (Response to Appellant's Point IV.)

In Point IV of her Brief, Halliday makes three distinct arguments as to why the Probate Court erred in denying her claim against the estate of Boland. First, Halliday attempts to distinguish *Hanff* and evade the provisions of §516.350 by arguing that if the Judgment is unenforceable she can still maintain an action based upon breach of contract. In support of her theory, Halliday points out that the Separation Agreement contains the standard boiler-plate language that "[i]n the event that any provision of this Agreement is unenforceable ***when*** incorporated as part of the Court's judgment, it shall be considered severable and enforceable by an action based on contractual obligation and it shall not invalidate the remainder of this Agreement as incorporated in any Decree." (emphasis added) (L.F. 24)

"When the language of a provision is in dispute, the court must determine the parties' intent as manifested in the document itself and not by what the parties say they

intended. *Daily v. Daily*, 912 S.W.2d 110, 114 (Mo.App. 1995). Further, [t]his is done by giving the words of the agreement their plain and ordinary meaning as understood by a reasonable and average person." *Hughes v. Hughes*, 23 S.W.3d 838, 839 (Mo.App. 2000). It is beyond dispute that at the time the Decree of Dissolution was entered on July 7, 1981 the terms of the Separation Agreement, as incorporated into the Decree of Dissolution, were fully enforceable through an action for Contempt. Halliday does not allege that the provision relating to keeping life insurance in force was unenforceable ***when*** the Decree of Dissolution was entered. Halliday only alleges that the provision of the Separation Agreement relating to life insurance is now enforceable as a contract action some twenty years after the Decree of Dissolution which incorporated the Separation Agreement was rendered.

Halliday's statement that the parties intended to protect their agreement against a lapse in enforcement is without any factual basis. The plain language of the Separation Agreement clearly states that if a provision is unenforceable ***when*** incorporated into the Decree it is enforceable by a contract action. The Separation Agreement did not state that if a provision is unenforceable ***at any time*** it could be enforceable by a contract action. Boland's obligation to keep in force life insurance was conclusively presumed paid July 10, 1991, or over a decade before the passage of the current version of §516.350.

Next, Halliday argues that *Hanff* is distinguishable because the case at bar relates to a claim against the estate of Boland while *Hanff* chose to bring a direct action against Mr. Hanff's second wife. This is a distinction without substance. Regardless of whether Halliday brought a claim against the estate or a direct action it is based upon a previously

entered judgment. *Helfenbein v. Helfenbein*, 871 S.W.2d 131, 134 (Mo.App. 1994). Further, whether an action can be maintained depends on the enforceability of the judgment. *See Hanff*, 987 S.W.2d at 356. Consequently, because Halliday's claim against the estate of Boland involves the enforceability of a previously entered judgment her claim must fail because the judgment was conclusively presumed paid as of July 10, 1991.

Finally, Halliday argues that *Hanff* should not apply because it is unfair. In support, Halliday cites *Principal Mutual Life Ins. Co. v. Karney*, 5 F.Supp. 720 (E.D.Mo. 1998) wherein the Federal District Court failed to follow current Missouri case law. Rather than serving as precedence, *Karney* is an anomaly that should be disregarded. In clear contravention with previously decided Missouri law, the District Court ruled that §516.100 applied to previously entered judgments. In so ruling, the Court concluded that if §516.350 applied to divorce cases, then the parties would have to revive their divorce decree's every ten year otherwise the divorce would be nullified.

In a long line of cases, Missouri courts have consistently followed a bright line test holding that judgments have to be revived within ten years of their rendition, otherwise they are conclusively presumed paid. The fact that money was not due to Halliday until Boland's death is of no import. *See Hedges v. McKittrick*, 153 S.W.2d 790 (Mo.App. 1941) in which sums were to be paid out of the proceeds of the sale of a building. The Court held that plaintiffs action to enforce the judgment was barred despite their argument that the debt was not due because the property had never been sold.; *Wormington v. City of Monett*, 218 S.W.2d 586 (Mo. banc. 1949) in which judgment was

entered on a bond. While under appeal, the ten year limitations ran. This Court ruled that failure to revive the judgment, even while under appeal, created the conclusive presumption that the debt was paid, thereby wiping out or canceling the debt. Finally, in *Ronollo v. Ronollo,* 936 S.W.2d 188 (Mo.App. 1996) the Court entered a Judgment in favor of wife's attorney that she should pay $2,400.00 attorney fees from her share of the proceeds of the marital residence. Fourteen years after the entry of the judgment, attorney filed a motion for contempt and execution asserting that the parties had failed to sell the marital residence as ordered. Attorney argued that the ten years for revival under §516.350 did not begin to run until the parties took the house off the market. The Court of Appeals soundly rejected this argument, stating: "[t]he ten years runs from the date of judgment, not the date the judgment become collectible."

On July 7, 1981, Halliday obtained a fully enforceable judgment against Boland. Halliday had the absolute right under the terms of the Separation Agreement to demand proof that Boland was complying with the terms of the Separation Agreement. (L.F. 24) Had Boland failed to provide such proof, Halliday was free to bring a Contempt action against Boland to enforce the Decree of Dissolution. It is beyond dispute that Halliday took no action to either enforce the Divorce Decree or revive the judgment within ten years of its rendition. Because of Halliday's failure to revive the Divorce Decree as provided in §516.350 (1982), the Probate Court correctly denied Halliday's claim against Boland's estate.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the St. Louis County Circuit Court, Probate Division denying the claim of Pat Halliday.

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CERTIFICATE OF COMPLIANCE AND SERVICE

This RESPONDENT'S BRIEF is file by

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who by his signature below hereby certifies that this RESPONDENT'S BRIEF complies with Rule 84.06(b), and contains 4,407 words, not including the cover, certificate of service, certificate of compliance, signature block or appendix, and that the accompanying diskette with an electronic copy of the brief has been scanned and is virus-free.

Counsel for Respondent certified further that he mailed an original and ten paper copies of this brief to the Clerk of the Supreme Court for filing, along with a virus-free diskette containing the electronic copy of this brief, and that he sent two paper copies and one diskette to the attorney for Appellant Mary Frances (Boland) Halliday and one paper copy to the attorney for the Boland Trust, listed below, in compliance with Rule 84.06(a) and (g).

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